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In the Supreme Court of the United States

OCTOBER TERM, 1979

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. We argued in our opening brief that 10 U.S.C. 1034 applies only to the individual communications of servicemen with Members of Congress and not to the public circulation of group petitions. We noted that the statute was enacted in response to an incident in which an individual sailor had been threatened with a court martial if he sent a letter to his Congressman without transmitting it through the military chain of command. 97 Cong. Rec. 3776 (1951). The Navy informed Congress at that time that, under Articles 1248 and 1249 of its regulations, "any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, should be sent through official channels."[1] *Ibid.* Congress enacted 10 U.S.C. 1034 with the express and limited

[1]By contrast, the Air Force informed Congress that any airman's "personal correspondence remains a matter entirely of his own choice." 97 Cong. Rec. 3777 (1951).

objective in mind of permitting "any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951) (Rep. Vinson). Accord, *id.* at 3877. Throughout the legislative history, the focus of the congressional concern was on removing restrictions on individual communications with Members of Congress; group activity and petitions were not considered or discussed even indirectly in the legislative debates.

Despite the complete absence of any reference in the legislative history or in the statute[2] to collective or group petitioning activity, respondent argues that 10 U.S.C. 1034 applies to group petitions as well as to individual communications with Members of Congress. In support of this contention, respondent notes that approximately a month after 10 U.S.C. 1034 was enacted,[3] Representative Javits inserted into the Congressional Record a copy of what was then Article 1248 of the Navy Regulations. The text of Article 1248 showed that headquarters clearance was then required by the Navy not only for individual "communications [to a member of Congress] from any person or persons in the naval service" but also for "petitions, remonstrances [and] memorials." 97 Cong. Rec. A4977 (1951). Respondent apparently reasons (Resp. Br. 9) that, because Navy regulations in 1951 required

[2]10 U.S.C. 1034 does not mention petitioning or collective activity. It applies only to a "communication" between a "member of an armed force * * * [and] a Member of Congress." *Ibid.* By contrast, 5 U.S.C. 7102 provides that "[t]he right of [Civil Service] employees, individually or collectively, to petition Congress or a member of Congress * * * may not be interfered with or denied."

[3]10 U.S.C. 1034 was enacted on June 19, 1951. Section 1(d) of Pub. L. No. 51, 65 Stat. 78. Representative Javits placed a copy of Article 1248 in the Congressional Record as part of the extension of his remarks of July 25, 1951. 97 Cong. Rec. A4977 (1951).

headquarters clearance for "petitions" as well as "communications," when Congress referred only to "communications" in 10 U.S.C. 1034 it must have intended to refer to both.

But Representative Javits did not state or imply in his remarks following enactment of the statute that Section 1034 encompasses both group petitions and individual communications with Congressmen. See 97 Cong. Rec. A4977 (1951). Even if he had, of course, such a post-enactment statement "by a single member of Congress [would] carry little if any weight." *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978). See *Chandler* v. *Roudebush*, 425 U.S. 840, 860 n.36 (1976); *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). What is significant in understanding the legislative intent is the evil the statute was designed to remedy and the situation "as it was pressed upon the attention of the legislative body." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463 (1892). See *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 64 (1878). As we demonstrated in our opening brief (Br. 37-42), Congress was concerned with—and the language of the statute is focused solely upon (see note 2, *supra*)— individual communications of servicemen with Members of Congress.[4] The statute was not meant to embrace group petitioning activity, and the text reflects its limited concern with individual communications.

[4]At the time Congress enacted this statute, it was concerned only with the portion of the Navy regulation that required "any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, [to] be sent through official channels." 97 Cong. Rec. 3776 (1951). This was the only feature of the regulation that Congress had before it when Section 1034 was enacted. See *ibid.*

Moreover, *if* Congress had been aware (which it plainly was not, see note 4, *supra*) that then-existing Navy regulations required both individual "communications" and group "petitions" to be sent through official channels, this would not support respondent's contention that the statute applies to both. If any inference could be drawn from the fact that Navy regulations in 1951 described "petitions" and "communications" separately while the statute refers only to "communications," the inference would be that Congress did not legislate with respect to group "petitions." See also note 2, *supra*.[5] The question is entirely hypothetical, however, because, at the time the legislation was enacted, Congress had been informed only that the Navy regulations required "any letter from a member of the naval service, to Congress * * *, [to] be sent through official channels." 97 Cong. Rec. 3776 (1951). See note 4, *supra*. As we have shown, it was the concern for freeing such individual communications from official channels that was the exclusive focus of the legislation.

2. Respondent argues (Resp. Br. 22-29) that, if 10 U.S.C. 1034 bars application of the challenged regulation to the distribution of petitions to Members of Congress, there is no need for the Court to consider in this case whether the Constitution bars application of the regulation to the distribution of petitions to other government officers. We disagree.

[5]See Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again*, 28 Emory L.J. 3, 31-35 (1979). See also *id.* at 33: "It is apparent that [the legislative] discussions reflected a belief that the only form of communication covered by the statute was individual letters by servicemembers, not efforts to gain a mass of signatures on a protest document."

a. 10 U.S.C. 1034 applies only to communications "with a member of Congress," and one of respondent's petitions was addressed to the Secretary of Defense. Respondent argues that "[i]t would be unjust if not absurd" (Resp. Br. 29) for the statute to apply only to petitions to Members of Congress and not to petitions addressed to other government officers. Respondent therefore proposes that the term "Member of Congress" in 10 U.S.C. 1034 be "construed broadly" (Resp. Br. 29) to include the Secretary of Defense.

Construing the term "Member of Congress" in 10 U.S.C. 1034 to include the Secretary of Defense would not merely "fracture the clear language of [the] statute,"[6] it would ignore it. " 'The starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). When, as here, Congress has spoken "in the plainest of words," *TVA* v. *Hill*, 437 U.S. 153, 194 (1978), the Court may not "pre-empt congressional action" and disregard the limited "course consciously selected by the Congress * * *." *Id.* at 194, 195. The Secretary of Defense is not a Member of Congress, and the petition addressed to him is plainly outside the scope of 10 U.S.C. 1034.

b. Respondent claims (Resp. Br. 22-26) that, if the petitions he addressed to Members of Congress are protected by 10 U.S.C. 1034, his transfer to the inactive reserve should be reversed for this reason alone. Respondent argues that this case therefore fails to raise the question whether the Constitution bars application of the regulation to petitions addressed to persons other than Members of Congress.

[6]*Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip. op. 8.

But the district court did not merely reverse respondent's transfer and order him reinstated to active duty. The court also declared the challenged military regulations, as applied to petitions addressed to any government officer, "to be null, void and inoperative, as being in conflict with the First Amendment to the Constitution * * *" (A. 37). This declaratory judgment was affirmed by the court of appeals (Pet. App. 9a, 14a, 16a). Because respondent must be returned to active duty under the judgment of the courts below (A. 37), there is a continuing controversy between respondent and petitioners concerning the constitutionality of the challenged regulations.

3. In *Greer* v. *Spock*, 424 U.S. 828 (1976), this Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute any publication on base. *Id.* at 831. The Court noted that a military base is not a public forum (*id.* at 831) and concluded that (*id.* at 840):

> There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

Respondent attempts to distinguish *Greer* v. *Spock* from the present case on the theory that the two cases involve "entirely different" speech interests and governmental policies (Resp. Br. 30).

But, as we noted in our opening brief (Br. 17), the regulations at issue in this case are identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*. Both in this case and in *Greer* v. *Spock*, the only materials that a military commander "may disapprove [for on base distribution] are those that he finds constitute 'a clear

danger to [military] loyalty, discipline, or morale' * * *." 424 U.S. at 840. See AFR 35-15(3)(a)(2). The governmental interest involved here is thus in no way different from that involved in *Greer* v. *Spock*.

Nor is the challenged regulation more severe in its effect on free speech interests than was the regulation upheld in *Greer* v. *Spock*, as respondent contends (Resp. Br. 31-32). As we have shown in our opening brief (*e.g.*, Br. 19-20), the regulation preserves a broad range of opportunities for servicemen to engage in political discussion and political action while protecting the government's substantial interest in averting conduct that presents a "clear danger to the loyalty, discipline, or morale" of troops serving the nation's defense. The record in this case demonstrates that servicemen (i) may distribute petitions off base wholly without command approval;[7] (ii) may distribute petitions on base with command approval when the distribution does not clearly endanger military loyalty, discipline and morale;[8] (iii) may communicate individually

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[7]Pursuant to agreements with nations where United States bases are located, the off base-distribution of petitions and other forms of political activity are prohibited at foreign duty stations. See Br. 20 n.8; *Culver* v. *Secretary of the Air Force*, 559 F. 2d 622, 628 (D.C. Cir. 1977). This restriction was upheld in *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 48a-50a), and is not challenged by respondent.

[8]Respondent apparently contends that the substantive regulatory criteria afford no protection to servicemen because "[e]ach time a request has been made to circulate a petition on base, the request has been denied" (Resp. Br. 57; see *id.* at 21). This statement is simply in error. Permission to distribute petitions is often granted, because distribution is prohibited only if it presents a clear danger to military discipline, loyalty or morale. To be sure, it is only when distribution is prohibited that litigation occurs, and it is this obvious fact that explains why "[i]n each of the *reported* cases where permission was sought to circulate petitions on military bases, such permission was

with any Member of Congress or other government officers; and (iv) may engage in oral discussions of political topics or other issues either off base or on base (see Br. 19-20 and n.7).

There is thus no basis for distinguishing this case from *Greer* v. *Spock*, and the constitutionality of the regulation should be upheld for this reason alone.

b. Respondent argues that the regulatory prior approval requirement is unconstitutional because the government has not shown that prior approval is necessary to protect the government's valid interest in "loyalty, discipline and morale in all but exceptional circumstances" (Resp. Br. 50). But respondent has mischaracterized the burden that the government bears in defense of the challenged regulation.

First, as we have shown in our opening brief (Br. 28-30), a military base is not a public forum. The government may prohibit speech and conduct, including petitioning activities, that interfere with the substantial purposes of military facilities. *Greer* v. *Spock*, *supra*, 424 U.S. at 838, 840; See *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974); *Police Department* v. *Mosley*, 408 U.S. 92, 100-102 (1972). The regulatory prohibition against the on base distribution of petitions that clearly endanger military loyalty, discipline and morale is based on clear standards that limit the use of military facilities to the purpose for which the facilities were created; the prior approval requirement, which implements the substantive prohibi-

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denied" (Resp. Br. 21; emphasis supplied). We note, however, that permission to distribute petitions on base was granted by the base commander in at least one instance detailed in the record of *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 40a). In this case, respondent never sought permission to circulate his petition; he was aware of the regulatory prior approval requirement and acted in conscious defiance of it (Pet. App. 2a-4a).

tion, is therefore constitutional (Br. 29). See *Greer* v. *Spock*, *supra*, 424 U.S. at 840; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975).

Second, even if military bases could be regarded as public forums, the challenged regulations constitute essentially time, place and manner restrictions, rather than prior restraints on speech.[9] As we discussed above (pages 7-8, *supra*) and in our opening brief (Br. 19-20), a serviceman is free to discuss and communicate political ideas both on and off military base. The regulation requires only that such discussion and communication be conducted in a manner and in a place that does not create a clear danger to fundamental military objectives. This regulatory objective is plainly constitutional. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-112 (1972).

Finally, respondent is wrong in contending that, under this Court's decisions, a prior approval requirement can be valid *only* if the threatened injury to military discipline, loyalty and morale exists in "all but exceptional circumstances." The Court has never imposed such a standard, either for the screening of materials prior to permitting their distribution on a military base (*Greer* v. *Spock*, *supra*, 424 U.S. at 840) or for the screening of motion pictures prior to licensing them for distribution in a city's theatres (*Times Film Corp.* v. *Chicago*, 365 U.S. 43, 49-50 (1961)). Instead, the Court has held that a system of prior approval is permissible where a less restrictive regulatory scheme would not be adequate to

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[9]The regulation is not invalid under the First Amendment merely because it looks to the content of the petition, among other considerations, in determining whether distribution would clearly endanger military loyalty, discipline or morale. See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 742-750 (1978); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (plurality opinion).

avert or "mitigate the effects" of an improper distribution. *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976). As we have shown in our opening brief (Br. 33-35), there are no adequate less restrictive alternatives to safeguard the fundamental military interests that underlie the regulations challenged in this case.

For the reasons stated here and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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